Supreme Court, U. S.
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No. 74-354

In the Supreme Court of the United States

OCTOBER TERM, 1974

LOUIS VERIVE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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NO.

LOUIS VERIVE,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Louis Verive, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The Unpublished Order of the United States Court of Appeals for the Seventh Circuit in the above entitled cause, dated July 10, 1974, affirmed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. The Unpublished Order of the Court of Appeals is reprinted as Appendix A, *infra*. A Petition for Rehearing was timely filed but was denied by Order dated September 5, 1974, which Order is reprinted as Appendix B, *infra*.

STATEMENT OF JURISDICTION

The Unpublished Order of the United States Court of Appeals for the Seventh Circuit, entered on July 10, 1974, affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division. A timely Petition was denied by the Court of Appeals on September 5, 1974. This Petition for Writ of Certiorari is filed within thirty days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Does the doctrine of res judicata in a criminal case bar redetermination of a critical issue resolved against the government as to a codefendant in an initial trial where a defendant is tried alone in a subsequent trial under the same indictment?

STATEMENT OF THE CASE

A. NATURE OF THE CAUSE AND ITS DISPOSITION

This case was commenced by an indictment which was returned against the Petitioner. The indictment charged the Petitioner with conspiracy to commit mail fraud and with three substantive counts of mail fraud, in violation of Title 18, U.S.C. §371 and Title 18 U.S.C. §1341 respectively. The indictment charged the Petitioner and 19 other defendants concerning an alleged scheme involving the obtaining of loan commitments from an organization known as Church of Christ Manors, Inc.

Due to an operation for the removal of a lung, Petitioner's cause was severed from the other defendants and he proceeded to trial some eight months after the initial trial of the other codefendants. At this initial trial 13 defendants were prosecuted and nine, including George Stanazek, were found to be not guilty. The Petitioner's trial resulted in a jury verdict of guilty as charged in all four counts of the indictment. Upon the return of the verdict of guilty, the Petitioner was committed to the custody of the Attorney General for four years. Notice of appeal on behalf of the Petitioner was timely filed on July 10, 1974. The Court of Appeals entered a decision which affirmed the judgment of the Petitioner's conviction (Appendix A *infra*). Petitioner timely filed a Petition for rehearing which was denied by order dated September 5, 1974 (Appendix B *infra*). Thereafter this Petition for Certiorari was timely filed.

B. THE FACTS

19 defendants including the Petitioner, Verive, were named in an indictment charging mail fraud (18 U.S.C.,

§1341), wire fraud (18 U.S.C., §1343), causing interstate travel for purposes of fraud (18 U.S.C, §2314) and conspiracy to violate the substantive offenses (18 U.S.C., §371). The alleged scheme involved the obtaining of loan commitments from an organization known as the Church of Christ Manors, Inc.

Due to an operation for the removal of a lung, Verive's cause was severed from the other defendants and he proceeded to trial some eight months after the initial trial of the other codefendants. At this initial trial 13 defendants were prosecuted and nine were found to be not guilty. George Stanazek was one of the defendants found not guilty in the initial trial.

The government introduced evidence at the Verive trial primarily about two loan transactions, those of Mr. Pyle and Mr. Deevers. Stanazek was the prime mover and principal in both the Pyle and Deevers transaction. The Petitioner, Verive was involved minimally and entered the negotiations at a late stage.

In the initial trial, the Stanazek jury was instructed that they could find those defendants guilty of conspiring with Louis Verive. After receiving those instructions, the jury found Stanazek not guilty. Despite this the same trial Court that presided over the initial trial instructed the Verive jury on the three substantive counts on the scheme to defraud:

> ". . . the indictment charges in pertinent part that beginning on or about August 1, 1966, and continuing up to and including December, 1970, in the Northern District of Illinois, Eastern Division, and elsewhere, Alex Gaus, Jr., Daniel Jerome, *George Stanazek, Louis Verive*, Cyrus Welch and Charles York devised and intended to devise a scheme and artifice to defraud and

> for obtaining money and property by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made." (Tr. pp. 511-512)

As to the conspiracy count, the Court's final charge to the jury stated in part that:

> ". . . That count charges that beginning on or about August 1, 1967, and continuing to and including December, 1970, in the Northern District of Illinois and elsewhere, Alex Gaus, Jr., Daniel Jerome, *George Stanazek*, *Louis Verive*, Cyrus Welch and Charles York, *defendants herein*, did unlawfully, wilfully and knowingly combine, *conspire*, confederate and *agree together* and with each other and with diverse other persons whose names to the grand jury are known and unknown, to commit offenses against the United States." (Tr. pp. 519-521)

We thus have the fundamentally unfair trial situation where a jury was instructed that this Petitioner could be found guilty of being in a scheme to defraud and of conspiring with the acquitted Stanazek, the principal in the transactions.

REASONS FOR GRANTING THE WRIT

UNDER SEALFON V. UNITED STATES 332 U.S. 575 (1948) THE DOCTRINE OF RES JUDICATA IN A CRIMINAL CASE BARS REDETERMINATION OF A CRITICAL ISSUE RESOLVED AGAINST THE GOVERNMENT AS TO A CODEFENDANT IN AN INITIAL TRIAL WHERE ANOTHER DEFENDANT IS TRIED ALONE IN A SUBSEQUENT TRIAL UNDER THE SAME INDICTMENT.

The question of Stanazek's membership in the conspiracy with Verive had already been determined by the Stanazek jury adversely to the government and was re-litigated here to the prejudice of Verive.

In *Williams* v. *United States,* 179 F.2d 644 (5th Cir., 1950) in the first trial, four defendants were tried on the substantive counts of committing and aiding and abetting the beating of four persons named in the counts of the indictment. Three of the four defendants were found not guilty and the principal, Williams, was found guilty. In the second trial the same four defendants were convicted of conspiracy to beat the same four named persons. The Court in *Williams* reversed the convictions of all four defendants including Williams. After noting that the conspiracy trial was not barred on the principal of former jeopardy, the Court said on page 649:

> "But the claim is also made here, that if there is no complete bar to this prosecution there is an *adjudication of a fact issue* involved in it, to-wit that these defendants did not commit or counsel or aid or abet the beating and other mistreatment of the four persons

named in the counts of the indictments. Proof was offered that the transactions were the same and that the court in the former trial charged the jury that if the defendants did the things charged, or counseled or commanded or aided and abetted the doing of them, they were severally guilty. Only Williams was found guilty, and the others not guilty. While an adjudication in a civil case is in general of no force in a criminal prosecution, and vice versa, either as a complete bar by *res judicata* or as settling some issue actually tried, 50 C.J.S., Judgments, §754(b), it is otherwise as to two criminal cases prosecuted by the same government against the same defendant or defendants, and the principals of adjudication are applied, and are not supplanted by the Constitution's provision against former jeopardy."

In *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948), this Court held that the doctrine of res judicata applied to criminal cases as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. See also *Yawn* v. *United States*, 244 F.2d 235 (5th Cir., 1957).

In *Herman* v. *United States*, 289 F.2d 362 (5th Cir., 1961) four men including Herman were indicted for conspiracy. One defendant pleaded guilty; Herman was convicted by a jury; and the jury acquitted the two other defendants. The only overt act alleged in the conspiracy was committed by the two acquitted defendants. The Fifth Circuit in *Herman* held that the jury's acquittal of these two defendants was binding on the government as to the defendant, Herman and dismissed the conspiracy charge since the only overt act was committed by the two acquitted defendants. It should be noted that Herman could have been convicted of conspiring with the fourth co-conspirators' innocence required the reversal of Herman's conviction.

In *Leyras* v. *United States*, 264 F.2d 272 (9th Cir., 1958), the Appellate Court specifically approved the rulings of

the District Court which struck from the record all the testimony relating to codefendants acquitted and gave painstaking instructions and admonitions to the jury to exclude from their consideration evidence concerning the acquitted codefendants. The *Leyvas* case involved a joint trial in which the Judge granted a motion for judgment of acquittal as to certain defendants at the close of all the evidence. The mere fact that here we have a former jury's determination of lack of guilt of Stanazek instead of the Judge's determination of the not guilty as in *Leyvas* does not distinguish the two cases. Neither is the *Leyvas* case distinguishable on the ground that here he had two separate trials.

The Panel's Opinion in its extremely brief discussion of this point completely misses the thrust of the Appellant's argument and relies on *dicta* from *United States* v. *Bass*, 472 F. 2d 207 (8th Cir., 1973), a case which is completely inapposite. The Panel's Opinion at Page 6 states:

> "Verive argued that the testimony of Deevers and Pyle concerning their conversations with co-conspirator Stanazek was not admissible because Stanazek had been acquitted in the prior trial."

Verive's argument goes much further since the error is not only the introduction of acts and declarations but much more important, the fact that the jury was instructed that they could find Verive guilty of actually conspiring with Stanazek even though Stanazek had been acquitted. The holding in *United States* v. *Bass* was that where in the only overt act charged in the indictment the convicted defendant, Bass was alleged to have paid moneys to an acquitted codefendant, Townley, the indictment was sufficient because the convicted defendant had actually performed the overt act. The Court in *Bass* distinguished that situation from *Herman* v. *United States*, 289 F.2d 362 (5th Cir., 1961), a case cited by the Petitioner, Verive in this brief,

where the Court held that when only the acquitted codefendant performed the single overt act in the indictment the indictment must fall. The *Bass* case, therefore, has nothing to do with the issues raised in this case that is whether the prior acquittal of Stanazek constituted res judicata and collateral estoppel on the issue of whether Verive conspired with Stanazek.

The Panel's Opinion then turns to the *dicta* in *Bass* for a statement taken out of context that:

> "Townley's acquittal in a prior trial does not prevent the jury from considering his relationship with other defendants and co-conspirators." (Op. p. 7)

Of course, the government could in this trial introduce evidence concerning Stanazek and his relationship with Verive during the Verive trial, but the question is can these acts of Stanazek, though Stanazek has been acquitted for, be considered by the Verive jury as the acts of a co-conspirator, and most important, can the jury be instructed that they can find Verive guilty of conspiring with the acquitted Stanazek?

It is patently unfair and in violation of the principles of *Sealfon* v. *United States*, 332 U.S. 575, that Verive's jury could find Verive guilty of conspiring with Stanazek.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
ARGUED JUNE 3, 1974
July 10, 1974
Before

Hon. TOM C. CLARK, *Associate Justice* *

Hon. WILBUR F. PELL, JR., *Circuit Judge*

Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1342 *v.*

STANLEY SCHULMAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1343 *v.*

WILLIAM E. DAUBER,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1649 *v.*

LOUIS VERIVE,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 72 CR 95
PHILIP W. TONE, *Judge.*

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

O R D E R

Nineteen defendants were named in a forty-one count indictment charging various combinations of defendants with mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), causing defrauded victims to travel interstate (18 U.S.C. § 2314), and conspiracy to violate the substantive offenses (18 U.S.C. § 371). Three of the defendants pleaded guilty, one was murdered prior to trial and two were severed for separate trials. Thirteen defendants were tried by a jury which acquitted nine of them of all charges and found four of them guilty on some counts. Two of those found guilty, William E. Dauber and Stanley Schulman, appealed. Dauber was convicted on ten substantive counts and the conspiracy count; Schulman was convicted on one substantive count and conspiracy.

Of the two defendants severed for separate trials, one was dismissed due to poor health and the other, Louis Verive, was tried alone. A jury found him guilty of three substantive counts and conspiracy. He has also appealed.

Dauber was sentenced to six years' imprisonment but this was later reduced to four years; Schulman was sentenced to three years' imprisonment; and Verive was sentenced to four years' imprisonment plus four years' probation, the probationary term to run consecutively.

Each defendant submitted a separate brief on appeal making some common and some different arguments, but inasmuch as each defendant also adopted the arguments of each other defendant, all of the arguments have been considered in their application to all defendants.

1. *Sufficiency of the Evidence.* Each defendant in one way or another pointed out that the jury found nine of the indicted persons not guilty and expressly or impliedly

argued that he was less guilty or at least less involved in the scheme than the nine acquitted. On the other side of the scoreboard, however, were the five defendants found guilty, three who pleaded guilty, and two who were spared judgment, one by death and the other by ill health. "Consistency in the verdict is not necessary." *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). The verdict of the jury in the case of each defendant must be sustained if there is substantial evidence to support it, taking the view most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942).

The conspiracy of which all three defendants were found guilty had an apparently honest beginning. Church of Christ Manors (CCM) was formed to assist the 6,000 Churches of Christ in attempting to secure government loans for housing and urban development. Once organized and in the hands of the conspirators, CCM purported to act and was represented as a lending institution, which never made nor procured a loan for its clients. Borrowers came from throughout the country seeking loans to finance their respective legitimate enterprises. The only function ever performed by CCM was to sell "commitment letters" for handsome fees. No commitment ever made by CCM was ever funded nor did CCM have any assets to lend. The essence of the fraudulent scheme and conspiracy was that the commitments were utterly worthless while the conspirators represented them to be binding agreements to furnish substantial loans.

In regard to defendant Dauber, he was convicted of defrauding William Fitzgerald, Franklin Haney, James Collins, Blair Green, Rudvick and Tyler and Irving Rothman. Dauber and Ostrander (who had pleaded guilty and appeared as a government witness) formed Mortgage Expedi-

tors, Inc. (ME) in order to obtain loans or commitments for clients through CCM. During its entire existence ME obtained no loans for its clients but sold many worthless CCM commitment letters. ME's own early investigation of CCM clearly indicated the fact that Churches of Christ were not furnishing funds nor pledging their assets to CCM. ME continued to sell CCM commitments although Ostrander and Dauber knew that no CCM funds were ever paid out to ME clients or to others. Fitzgerald paid ME $3,200; Haney paid ME $15,398; Collins paid $10,000, the check for which Dauber cashed; Green paid ME $4,140; Rudvick and Tyler paid ME $16,000; Rothman paid $8,000 to another conspirator but in the Rothman count (40) Dauber was charged and convicted of inducing Rothman to travel from New Jersey to Chicago in violation of 18 U.S.C. § 2314. There was substantial other evidence which also tended to show Dauber's knowing participation in the conspiracy, his vital assistance in causing the scheme to function and his "stake in the venture." *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713 (1943).

In regard to defendant Verive, witness York testified to conversations with Verive from which the jury could conclude that Verive knew the worthlessness of CCM commitments and the fact that the continued sale of them constituted outright fraud, prior to the Kettering transaction (for which Verive was convicted). Verive was a key participant in the "loan" for which Kettering paid an $18,000 commitment fee, $1,570.50 of which was retained by Verive's wife after she distributed portions of it to other conspirators. Additional evidence showed that Verive was heavily involved in the Pyle transaction wherein $40,000 was paid for a worthless commitment; that Verive represented to Pyle's attorney that the commitment was good; that Verive introduced Pyle to Rosanova, who told Pyle

when he complained about not receiving his loan, "such fellows as you, we throw out the window on their head"; and that Verive received $6,000 of the Pyle fee. Verive also received a portion of the fee in the Deevers and Barbee transactions. Verive was shown to be an active, knowing participant in the fraudulent scheme with a stake in the profits.

As to defendant Schulman, he was convicted in regard to the Frischling transaction wherein he received $14,500 of a $44,000 fee. Schulman testified that he received an additional $18,290 in checks from ME, which he used to pay CCM expenditures. He testified that an account at the Northern Trust Company bank in Chicago in his name, where a portion of the money he received was deposited, was opened at the request of Gaus, CCM's "financial consultant." The evidence also showed that Schulman received $1,000 from ME in the Blair Green transaction. Schulman could recall no specific payment he made on behalf of CCM. Schulman's contention that he was in the CCM office on an almost daily basis for the purpose of "running out for coffee and doughnuts" and similar errands in return for $32,790 for which he could not account, was subject to disbelief by the jury. There was evidence that Rosanova, who worked in the CCM office, introduced Schulman as his "associate." Schulman has not disputed the existence of the CCM conspiracy but only his participation in it. Once the existence of a common scheme is established "slight evidence" is sufficient to connect a defendant with it. *United States* v. *Robinson*, 470 F.2d 121, 123 (7th Cir. 1972). Here the proof was substantial to sustain Schulman's conviction.

2. *Kotteakos Argument.* Defendants have relied upon *Kotteakos* v. *United States*, 328 U.S. 750 (1946), where

thirty-two defendants were charged in the indictment with a single conspiracy although the government admitted that it had proved the existence of eight or more separate conspiracies. Convictions were reversed by the Supreme Court on the ground that each defendant had a substantial right not to be tried *en masse* for a conglomeration of separate offenses committed by others and that therefore the variance between the indictment and proof was not harmless error. In *Kotteakos,* Simon Brown charged a brokerage fee for obtaining federal housing loans by causing loan applicants to falsify their applications. Most of the indicted applicants had no connection with each other beyond their common tie to Brown.

In the present case although all the conspirators charged in the indictment were not involved in each of the many transactions, there was a vast amount of evidence connecting each defendant with several transactions. Dauber was convicted of involvement in six transactions and there was evidence tying him into many more. Although Verive and Schulman were each convicted of only one transaction, evidence showed that Verive was also a participant in the Deevers, Pyle and Barbee transaction, as well as meeting with York (who was employed by both ME and CCM) on a daily basis at the CCM office; and Schulman received a portion of the fee in the Blair Green deal and in at least five additional ME-CCM transactions, as well as being in the CCM office with Gaus and Rosanova on an almost daily basis. The other indicted conspirators were also involved in multiple transactions and assisted each other in additional transactions, often dividing a fee in many parts. This could clearly be regarded as a single conspiracy. *United States* v. *Hutul*, 416 F.2d 607, 617-620 (7th Cir. 1970). "While a conspiracy may have a small core of con-

spirators, other parties who join and terminate their relationship at various times in order to participate with the core conspirators to achieve a common goal may be members of the over-all conspiracy." *United States* v. *Cervantes*, 466 F.2d 736, 738 (7th Cir. 1972).

3. *Ostrander's Guilty Plea Known to Jury.* In the trial of Dauber and Schulman, the fact that government witness Ostrander had pleaded guilty to the same indictment was revealed to the jury in the government's opening statement and during Ostrander's direct examination. The trial court instructed the jury that Ostrander's plea was "not to be considered . . . in any way against any of the defendants . . ." Nevertheless Dauber and Schulman argued that this knowledge imparted to the jury denied them a fair trial. This circuit has held on several occasions that it is proper to inform the jury that a codefendant has pleaded guilty if an appropriate cautionary instruction is given. *United States* v. *Kaczmarek*, 490 F.2d 1031, 1035 (7th Cir. 1974); *United States* v. *Aldridge*, 484 F.2d 655, 659 (7th Cir. 1973) and cases cited therein.

4. *Use of Schulman's Out-of-Court Statements for Impeachment Purposes.* The trial involving Schulman began November 7, 1972 and ended January 15, 1973. In the middle of the trial the government discovered two statements made by Schulman to the F.B.I. in 1969 and 1971. The statements were tendered to the defense on December 12, 1972, twenty-four days before Schulman testified. Both statements were excluded from the government's case-in-chief under the court's discretionary power to enforce pretrial discovery rules. Fed. R. Crim. P. 16(g). Finding that the government had acted in good faith and inadvertently, the court permitted the government to use the statements for impeachment purposes under *Harris* v. *New York*, 401 U.S. 222 (1971), where a statement inadmissible

for failure to satisfy *Miranda* safeguards was held properly usable for impeachment purposes. Inasmuch as the trial court had discretion as to whether the tardy statements could be introduced or not, that discretion encompassed the question whether they could be used for the limited purpose of impeachment or not. We have examined the nine cited instances of impeachment. In each instance the court maintained complete control over the extent of the use made of the statements and over the quality of trustworthiness of the government's supporting rebuttal evidence proffered thereafter, appropriately cautioning the jury to disregard that which was deemed improper impeachment. We find no abuse of the court's discretion. Nor do we find that the government misrepresented the evidence in mentioning the facts relating to one of the instances where the government tried to impeach Schulman in its closing argument.

5. *Rosanova's Threats.* Rosanova's threats relating to throwing people out of windows, made to Pyle when Verive brought Pyle to see Rosanova, were made in Verive's presence and were admissible to show his state of mind. As a result of a *voir dire* examination of Pyle, the court concluded that Verive knew or believed that Rosanova was associated with CCM and the language of the threats put Verive on notice both that CCM did not intend to fulfill its commitments and was not a legitimate business enterprise.

6. *Declarations of Acquittal Co-conspirator.* Verive argued that the testimony of Deevers and Pyle concerning their conversations with co-conspirator Stanaszek was inadmissible because Stanaszek had been acquitted in the prior trial. We agree with the recent holding of the

Eighth Circuit in *United States* v. *Bass*, 472 F.2d 207, 213 (8th Cir. 1973) that "Townley's acquittal in a prior trial does not prevent the jury from considering his relationship with other defendants and co-conspirators." The trial court carefully cautioned the jury throughout the trial and in the final charge in regard to the conditions of admissibility of the testimony of a co-conspirator.

7. *Denial of Continuance for Verive's Health.* Verive was originally severed from the first trial because of impending lung surgery which occurred in October, 1972. A few days before the scheduled separate trial on April 9, 1973, Verive sought another continuance. Shortly prior thereto the government had him examined by a medical doctor who reported that it would be uncomfortable for Verive to travel from California to Chicago for trial but that he was physically able to do so. The trial court found that even the report of Verive's own doctor did not contain "any really solid evidence that a trial at this time will adversely affect Mr. Verive's health." We conclude that the court did not abuse its discretion in determining not to grant another continuance.

The judgments of conviction are affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 5, 1974.

Before

Hon. Tom C. Clark, Associate Justice
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1649 vs.

LOUIS VERIEVE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(72 CR 95)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-354

LOUIS VERIVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts of using the mails and other interstate facilities in furtherance of a scheme to defraud, and of conspiracy to do so, in violation of 18 U.S.C. 371, 1341, 1343, and 2314. Petitioner was sentenced to concurrent terms of four years' imprisonment on the conspiracy and one of the substantive counts, and to a consecutive term of four years' probation on a second substantive count.[1] The court of appeals affirmed (Pet. App. A). Petitioner's only contention here is that since one of the named co-conspirators had been acquitted of the conspiracy charge in an earlier trial, petitioner's prosecution on that charge was barred by *res judicata*.

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[1]The third substantive count was dismissed prior to sentencing.

Petitioner's convictions rested upon his participation in a fraudulent scheme that he and others conducted in the name of Church of Christ Manors (hereinafter "CCM"), an organization ostensibly formed to assist Church of Christ congregations in obtaining government construction loans. CCM held itself out as a financial broker or lending institution and sold "commitment letters" to the congregations; those letters were worthless, as CCM had no assets or government loan funds to back up such commitments. Petitioner took part in three separate fraudulent commitment transactions. In two of those transactions, the defrauded victim was referred to petitioner by George Stanaszek.

Stanaszek and twelve others had been tried together in an earlier trial; nine of those defendants, including Stanaszek, were acquitted on all counts; the remaining four were convicted of conspiracy and one or more substantive counts.[2]

The conspiracy count on which petitioner was convicted was based upon overt acts that included petitioner's dealings with Stanaszek. Petitioner contends that since Stanaszek had been acquitted on the same conspiracy count, the government was barred from prosecuting petitioner on that count.

We note at the outset that petitioner attacks only his conviction for conspiracy and that his sentence on the conspiracy count runs concurrently with that on one of the substantive counts. Accordingly, this would not be an appropriate case for discretionary review. See *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

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[2]Three other co-defendants pled guilty prior to trial, an additional co-defendant was murdered before trial, and the charges against one co-defendant were dismissed because of his ill health.

In any event, petitioner's prosecution for conspiracy was not barred by Stanaszek's acquittal. The doctrines of *res judicata* and collateral estoppel do not bar the government from bringing a conspiracy prosecution against a defendant after the acquittal of one of his alleged co-conspirators. Those doctrines have been applied in criminal cases only within the confines of the Fifth Amendment's guarantee against double jeopardy. Cf. *Ashe* v. *Swenson*, 397 U.S. 436. Petitioner was not prosecuted in the earlier trial and therefore he has no basis for a claim of *res judicata* or collateral estoppel.[3]

Moreover, the conspiracy count on which petitioner was convicted described his participation in overt acts with several co-defendants, not only with Stanaszek. Several of those listed as petitioner's co-conspirators had been convicted in the earlier trial. Thus this is not a case like *Herman* v. *United States*, 289 F. 2d 362 (C.A. 5), upon which petitioner relies, where the only described overt act was committed solely by acquitted co-defendants.[4] Accordingly, an earlier find-

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[3]*Sealfon* v. *United States*, 332 U.S. 575, and *Williams* v. *United States*, 179 F.2d 644 (C.A. 5), upon which petitioner relies, involved second prosecutions of the same defendants.

[4]In *Herman*, the court reversed the defendant's conspiracy conviction because the named co-conspirators who were responsible for the overt act were acquitted in the same trial. We believe that result is inconsistent with this Court's determination in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974 (slip op. 11), that consistency in verdicts is not required.

ing that, for example, Stanaszek had lacked the requisite conspiratorial intent would not bar petitioner's prosecution even if the principles of collateral estoppel were otherwise applicable. See, *e.g., United States* v. *Bass,* 472 F.2d 207, 213 (C.A. 8), certiorari denied *sub nom. Selb Mfg. Co.* v. *United States,* 412 U.S. 928; *Kamanosuke Yuge* v. *United States,* 127 F.2d 683, 689 (C.A. 9), certiorari denied *sub nom. Mateus* v. *United States,* 317 U.S. 618.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[5] *Leyvas* v. *United States,* 264 F.2d 272 (C.A. 9), upon which petitioner further relies, is not to the contrary; indeed, the court there disapproved the striking of evidence relating to acquitted co-conspirators (*id.* at 274).